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In the Supreme Court of the United States

OCTOBER TERM, 1979

EDUARDO ROMEROS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 1

Statement 2

Argument 5

Conclusion 10

CITATIONS

Cases:

Callanan v. *United States*, 364 U.S. 587 6

Dennis v. *United States*, 384 U.S. 855 7

Dunn v. *United States*, 284 U.S. 390 ..... 6, 7

Hamling v. *United States*, 418 U.S. 87 6

Iannelli v. *United States*, 420 U.S. 770 6

Lubin v. *United States*, 313 F. 2d 419 7

Parr v. *United States*, 363 U.S. 370 7

United States v. *Aldaco*, 564 F. 2d 706 9

United States v. *Binetti*, 552 F. 2d 1141 7

United States v. *Fleetwood*, 528 F. 2d 528 9-10

United States v. *Galardi*, 476 F. 2d 1072, cert. denied, 414 U.S. 839 7

United States v. *Harrell*, 436 F. 2d 606 10

United States v. *James*, 590 F. 2d 575, cert. denied, No. 78-1412 (June 4, 1979) 10

Page

Cases—(Continued):

United States v. *King*, 505 F. 2d 602 8

United States v. *Newman*, 490 F. 2d 139 8

United States v. *Smith*, 200 F. Supp. 227 7

United States v. *Thies*, 569 F. 2d 1268 7

United States v. *Veltre*, 591 F. 2d 347 ..... 6, 8

Ventimiglia v. *United States*, 242 F. 2d 620 7

Statutes:

18 U.S.C. 371 ..... 2, 7

42 U.S.C. 2971f(a) 2, 5, 6, 7, 8

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 600 F. 2d 1104.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on August 13, 1979. A petition for rehearing was denied on October 4, 1979, and the petition for a writ of certiorari was filed on November 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's conviction for conspiracy was rendered invalid by his acquittal of the substantive offenses that were the object of the conspiracy.

2. Whether the district court should have granted a mistrial after the government elicited testimony disclosing the guilty plea of a co-conspirator.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to misapply funds that were the subject of a federal grant, in violation of 18 U.S.C. 371. He was acquitted on two substantive counts charging that he misapplied the funds in violation of 42 U.S.C. 2971f(a). He was sentenced to five years' imprisonment, 120 days of which were to be served on 40 consecutive weekends. The balance of the sentence was suspended for three years, during which time petitioner was placed on probation (Tr. 623-624). The court of appeals affirmed (Pet. App. A).

The evidence at trial revealed that petitioner, a certified public accountant, was retained to audit programs sponsored by the Associated City County Economic Development Corporation of Edinburg, Texas, a non-profit corporation formed to obtain federal funds to implement programs to assist the poor (Tr. 27, 30-32). Its director, Eliseo Sandoval, became a close acquaintance of petitioner, and in 1976 the two men decided to form a general consulting firm to be called Universal Consultants (Tr. 34-37).

Because Sandoval lacked the resources to finance his share of the start-up money for the new business, petitioner agreed to lend him the necessary amount (Tr. 39). Petitioner subsequently submitted an invoice to the Development Corporation dated March 29, 1976, requesting an advance in the amount of $6,500 for his auditing work. Petitioner had not previously requested

an advance for services not yet performed (Tr. 59). Sandoval approved the request and authorized issuance of a check in payment of the invoice (Tr. 40-43). When petitioner received the check, Sandoval accompanied him to the bank. After petitioner cashed the check, he loaned Sandoval $1,600 from the proceeds to be deposited into the account of Universal Consultants. Contrary to normal practice, the rest of the money was not deposited into petitioner's business account (Tr. 41-44, 59). The $6,500 advance to petitioner was never deducted from an amount due on invoices submitted for work subsequently completed by petitioner (Tr. 44, 64-65, 90-99). Although Sandoval could have deducted the advance from payments on subsequent invoices submitted by petitioner, he did not do so, in part because of the money petitioner loaned him for his share of the start-up money for Universal Consultants (Tr. 91-92).

On August 11, 1976, Sandoval approved another requested advance to petitioner, in the amount of $7,500, again in part because of his indebtedness to petitioner for the $1,600 loan (Tr. 91-100, 102, 106). As of the trial date, neither advance had been deducted from petitioner's requests for payments for audits he conducted (Tr. 108-109).

2. During direct examination of Sandoval, the prosecutor asked permission to examine him as a hostile witness because he was not being as candid in his testimony as he had been in his interview with the prosecutor (Tr. 66). Although the trial court denied the request, it suggested that the government impeach the witness with a prior written statement (Tr. 66-67).

Thereupon, the government resumed questioning as follows (Tr. 67):

GOVERNMENT: Now, Mr. Sandoval you are named in Counts one, two, and three of this indictment as a defendant yourself, are you not?

SANDOVAL: Yes, sir.

GOVERNMENT: And what position have you taken with regards to Count one of the indictment?

SANDOVAL: I pleaded guilty to one of those counts, sir.

Petitioner's counsel immediately objected and moved for a mistrial. The prosecutor explained to the court that he brought out the guilty plea because Sandoval indicated in his testimony that he had not conspired with anyone (Tr. 69, 70-71). The prosecutor stated that his purpose was to probe into prior inconsistent statements Sandoval made at the time of his guilty plea (Tr. 70-71, 75-76). The trial court denied the mistrial request (Tr. 80), concluding that statements made at the time of the guilty plea could be used to impeach inconsistent trial testimony (Tr. 75-76, 79-80, 82) and that, in any event, any resulting prejudice could be cured by an appropriate cautionary instruction to the jury (Tr. 77-79). But the court nevertheless determined that in this case the prosecutor should not question Sandoval regarding any prior inconsistent statements made at the time the plea was entered.

The court then instructed the jury as follows (Tr. 89-90):

> Members of the jury, I just want to tell you before we recessed the United States Attorney asked Mr. Sandoval if he was a co-defendant in this case, and

> he said yes. And he asked him if you have pled guilty, and he said, "I pled guilty to one of these counts."
>
> And I want to instruct you that the fact that a co-defendant and a co-conspirator has pled guilty is no evidence of this man's guilt here. The fact that he has pled guilty is no evidence, and you are not to consider the fact that this man has pled guilty in any way regarding the guilt or innocence of Mr. Romeros.

And again, in its closing instructions to the jury, the court stated (Tr. 582):

> The fact that Eliseo Sandoval has come before you and said I plead guilty and I think that I willfully misapplied these funds doesn't make this man guilty. Because every defendant has a right to have his case tried on what he himself said or did. And it is not a question of whether Sandoval feels that he is guilty or not guilty. It's a question of you deciding whether this man had the specific intent to misapply these funds as I have defined that term to you.

ARGUMENT

1. Petitioner argues (Pet. 5-10) that his acquittal on the substantive counts of violating 42 U.S.C. 2971f(a), based on the two advances which were the object of the conspiracy, constitutes a finding that he had earned the monies advanced and that they were not, therefore, federal funds which could have been misapplied within the meaning of the statute. Petitioner further contends that this finding is a judicial determination that the object of the conspiracy was not a federal crime and that his conviction on the conspiracy count therefore cannot stand.

However, as petitioner concedes (Pet. 5), it is well settled that each count in the indictment is to be separately considered and that an acquittal on one count will not vitiate a conviction on another count that is supported by the evidence, even if the verdicts are inconsistent. *Hamling* v. *United States*, 418 U.S. 87, 101 (1974); *Dunn* v. *United States*, 284 U.S. 390, 393-394 (1932). The conspiracy and the substantive offense charged in the indictment are separate crimes, *Iannelli* v. *United States*, 420 U.S. 770, 777-778 (1975); *Callanan* v. *United States*, 364 U.S. 587 (1961), and a jury verdict of not guilty on the substantive counts based on transactions which were the object of the conspiracy does not bar a guilty verdict on the conspiracy count if it is supported by sufficient evidence. See, *e.g.*, *United States* v. *Veltre*, 591 F. 2d 347 (5th Cir. 1979).

In this case, the evidence was sufficient to support petitioner's conspiracy conviction, and the verdicts were not in fact necessarily inconsistent. Sandoval consented to and did advance petitioner federal funds and postponed deducting the advances from any future invoices in return for a loan from petitoner. This loan was consummated when Sandoval accompanied petitioner to the bank, where petitioner cashed the first advance and gave $1,600 to Sandoval, who then deposited the money in the Universal Consultants account. The jury could have concluded that Sandoval, rather than petitioner, had been responsible for any violation of 42 U.S.C. 2971f(a), because Sandoval had custody of the funds and (the jury could have believed) had already misappropriated them when petitioner received them. Alternatively, the jury could have engaged in jury nullification, choosing to convict petitioner only of conspiracy. Such nullification is not a basis for setting

aside the conviction on the remaining count. *Dunn* v. *United States, supra*, 284 U.S. at 393. There is also no basis for setting aside a conviction on the basis of speculation that the verdict may have been the result of compromise or mistake. *Id.* at 394.

The cases relied upon by petitioner (Pet. 5-6) are inapposite. In those cases, the court concluded that the prosecution had failed to introduce evidence of an essential element of the substantive offense charged or that the object of the conspiracy did not, as a matter of law, constitute an offense against the United States and that the defendants could therefore not be convicted under 18 U.S.C. 371 of a conspiracy "to commit any offense against the United States." See *Parr* v. *United States*, 363 U.S. 370, 393 (1960); *United States* v. *Thies*, 569 F. 2d 1268 (3d Cir. 1978); *United States* v. *Binetti*, 552 F. 2d 1141 (5th Cir. 1977); *United States* v. *Galardi*, 476 F. 2d 1072, 1079 (9th Cir.), cert. denied, 414 U.S. 839 (1973); *Ventimiglia* v. *United States*, 242 F. 2d 620 (4th Cir. 1957); *Lubin* v. *United States*, 313 F. 2d 419 (9th Cir. 1963); *United States* v. *Smith*, 200 F. Supp. 227 (E.D. Tenn. 1961). The result in these cases did not turn, therefore, upon any supposed inconsistency in jury verdicts. Here, the alleged misapplication of funds clearly constitutes an offense under 42 U.S.C. 2971f(a), and the evidence was sufficient to support a guilty verdict on Counts II and III alleging a violation of that statute, even though the jury did not return such a verdict.[1]

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[1]Moreover, contrary to petitioner's contention, the object of a conspiracy under 18 U.S.C. 371 need not always be a federal offense. That section embraces situations where "two or more persons conspire *either* to commit an offense against the United States, *or* to defraud the United States * * *." See, *e.g.*, *Dennis* v. *United States*, 384 U.S. 855, 862-864 (1966). Count I of the

2. Petitioner also contends (Pet. 10-16) that the trial court erred in refusing to grant a mistrial after the prosecutor elicited the fact that Sandoval pleaded guilty to one of the counts charged in the indictment. However, as the court of appeals held, "disclosure of the co-defendant's guilty plea did not constitute a reversible error since an appropriate cautionary instruction was given to the jury, the co-defendant appeared in court and was subject to cross-examination, and no aggravating circumstances were demonstrated" (Pet. App. 22, citing *United States* v. *Veltre*, *supra*, 591 F. 2d at 349-350). See also *United States* v. *King*, 505 F. 2d 602, 607-608 (5th Cir. 1974); *United States* v. *Newman*, 490 F. 2d 139 (3d Cir. 1974).

The prosecutor stated that he initiated the questioning regarding the guilty plea because he intended to use prior inconsistent statements made at the time of acceptance of the guilty plea to impeach certain of Sandoval's testimony at trial that suggested the absence of a conspiracy (Tr. 69, 70-71). The trial court credited this explanation and essentially agreed with the prosecutor's legal argument that such statements would be admissible (Tr. 75-76, 79-80, 82). Thus, the question pertaining to the guilty plea was apparently intended to put any

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indictment in the present case charged a conspiracy "to defraud the United States and a department and agency thereof, by wilfully and knowingly misapplying funds and causing to be misapplied, monies and funds * * * in violation of Section 371, Title 18 and Section 2971f(a), Title 42, United States Code." Thus, although the jury instructions did not address this point, it is conceivable that the jury could have acquitted petitioner on the substantive counts of violating 42 U.S.C. 2971f(a), finding that one or more of the essential elements of that offense were not proven beyond a reasonable doubt, but still have found a conspiracy to defraud the United States through a noncriminal misapplication of funds.

questions about prior inconsistent statements in context. This is therefore not a case in which the prosecutor sought to introduce the fact of a co-conspirator's guilty plea solely as direct evidence of the defendant's guilt. No emphasis was placed on the guilty plea at the time it was mentioned, the court did not allow any more questioning pertaining to the plea or statements made at the time it was entered (despite the court's ruling that such statements would be admissible), and the trial court gave cautionary instructions to the jury immediately after the guilty plea was mentioned and again before submitting the case to the jury.

Moreover, as the prosecutor pointed out to the court during the conference on petitioner's motion for a mistrial (Tr. 86-87), the jury was probably already aware that Sandoval had pleaded guilty. Petitioner's counsel had requested that the following question be asked of the jurors during voir dire: "Does any member of the jury panel feel that because one alleged accomplice and/or alleged co-conspirator has plead[ed] guilty that the other alleged accomplice and/or alleged co-conspirator must therefore also be guilty?" (I-R. 32). As the district court pointed out (Tr. 86-87), the indictment—which indicated that there were but two alleged conspirators (Sandoval and petitioner)—was also read to the jury. Thus, the jury would likely have concluded that the voir dire question pertained to Sandoval.

The Fifth Circuit cases relied upon by petitioner do not support his position. In *United States* v. *Aldaco*, 564 F. 2d 706 (5th Cir. 1977), for example, the court of appeals found that the prosecution's sole purpose for calling the witness was to elicit testimony about the guilty plea, and in *United States* v. *Fleetwood*, 528 F. 2d

528, 533, 536 (5th Cir. 1976), and *United States* v. *Harrell*, 436 F. 2d 606, 614-617 (5th Cir. 1970), the court found aggravating circumstances because the fact of the guilty plea was emphasized at trial. Even more significantly for present purposes, however, the trial court had failed in all three cases to give a cautionary instruction.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2]Contrary to petitioner's argument (Pet. 14-15), Sandoval's testimony was not in violation of pretrial assurances offered by the prosecutor or the Fifth Circuit's en banc decision in *United States* v. *James*, 590 F. 2d 575, cert. denied, No. 78-1412 (June 4, 1979). The agreement (Tr. 10-11) and decision both pertain to the use of statements made by a co-conspirator in furtherance of the conspiracy as substantive evidence of guilt under the traditional exception to the hearsay rule. They do not concern the possible use of prior inconsistent statements to impeach testimony at trial.